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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SERGIO ALCALA,

Plaintiff and Appellant,

v.

CITY OF SAN DIEGO EMPLOYEES'  
RETIREMENT SYSTEM BOARD OF  
DIRECTORS,

Defendant and Respondent.

D048569

(Super. Ct. No. GIC847606)

APPEAL from a judgment of the Superior Court of San Diego County, Yuri Hoffman, Judge. Affirmed.

The trial court denied Sergio Alcala's petition for writ of mandate seeking review of the San Diego City Employees' Retirement System's (SDCERS) denial of Alcala's application for disability retirement benefits. On appeal, Alcala contends: (1) no substantial evidence supports the court's determination he is not permanently incapacitated; (2) SDCERS is collaterally estopped from denying him disability

retirement benefits by the Workers' Compensation Appeals Board's (WCAB) ruling regarding Alcala's injury; and (3) the attorney for SDCERS was overzealous at the administrative hearing.

## FACTUAL AND PROCEDURAL BACKGROUND

The City of San Diego (City) hired Alcala in 1997 as a custodian. Alcala joined SDCERS in 1998, and started working in the Waste Water Department in 1999. Alcala has a history of work-related injuries including a hernia, back strain, and groin and shoulder injuries. On October 19, 2000, Alcala injured his lower back while pulling a rodding hose out of a sewer. An urgent care doctor diagnosed his condition as lumbar strain and restricted him to light duty. Alcala's primary treating physician, Dr. Power, later diagnosed Alcala with ruptured discs based on a magnetic resonance imaging (MRI) scan showing mildly bulged discs at two levels. Several orthopedic surgeons evaluated Alcala and advised against surgery.

In May 2001, Dr. Power issued his permanent and stationary report, noting Alcala's back pain was "mild and infrequent," his posture, gait, and stance were "normal," he could raise his legs "with no discomfort at all," and had "no tenderness to palpation." Despite these observations, Dr. Power concluded Alcala had lost 50 percent of his pre-injury capacity for lifting and consequently was unable to perform his job. The WCAB awarded Alcala temporary disability workers' compensation benefits.

Based on Dr. Power's report, the City terminated Alcala's employment and provided vocational rehabilitation. In the fall of 2001, Alcala applied to SDCERS<sup>1</sup> for disability retirement benefits. Alcala later submitted a "Doctor's Statement of Incapacity" from Dr. Power dated April 30, 2002, concluding Alcala was permanently incapacitated, but noting "[p]atient last evaluated 9-7-01. Current status unknown." Alcala's next visit to Dr. Power was April 23, 2003. Based on Alcala's medical records, it appears he did not seek medical treatment for his allegedly incapacitating injury for nearly 20 months.

Dr. Curran evaluated Alcala at SDCERS's request. After examining Alcala and his medical records, including MRI scans and x-rays, Dr. Curran noted Alcala had minimal to mild degenerative disc disease, but concluded Alcala did not have an orthopedic back injury.

At the disability retirement hearing, Dr. Power did not testify. Dr. Curran testified and explained "[Alcala's] MRI scans and his x-rays are compatible with age-related findings and [his alleged injuries] are slight to minimal in degree." Of particular significance to the adjudicator, Alcala testified and impeached his own testimony by stating that he told Dr. Curran he *was* working at the time of the examination when Dr. Curran testified Alcala said he was *not* working. More importantly, on Dr. Curran's examination questionnaire, Alcala wrote "no" in response to the question, "Are you working at this time?" In fact, Alcala was working part-time as a limousine driver.

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<sup>1</sup> SDCERS is an independent entity that administers the retirement fund of the City's employees. (*Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, 571.)

The hearing adjudicator recommended that SDCERS deny Alcala disability retirement benefits. The adjudicator concluded the testimony of Dr. Curran, as a board-certified orthopedic specialist with extensive experience, was entitled to greater weight than the opinion of the treating physician, Dr. Power, which opinion was unsupported by objective evidence. In addition, the adjudicator noted "Alcala's testimony [about his work history] is demonstrably untrue and affects the credibility of his claim."

The SDCERS Board adopted the adjudicator's determination that Alcala was not permanently incapacitated and denied his application for disability retirement. The Board denied Alcala's request for reconsideration of its decision.

Alcala petitioned the superior court for writ of mandate. The court properly used its independent judgment to determine if the administrative findings were supported by the weight of the evidence. (See *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32.) The court denied the writ, concluding the weight of the evidence supported SDCERS's decision to deny Alcala's application.

## DISCUSSION

"[W]hen, as here, the trial court is required to review an administrative decision under the independent judgment standard of review, the standard of review on appeal of the trial court's determination is the substantial evidence test." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824, citing *Drummev v. State Bd. of Funeral Directors* (1939) 13 Cal.2d 75, 86.) We do not evaluate the credibility of the witnesses (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968), and the expert opinion of a single

physician can constitute substantial evidence to support a decision. (*LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal. 3d 627, 639.)

## I

### *Substantial Evidence Supports the Decision that Alcala is not Permanently Incapacitated*

San Diego provides an industrial disability retirement allowance for a city employee permanently incapacitated from the performance of duty as the result of an injury arising out of his or her employment. (S.D. Mun. Code, § 24.0501, subd. (b)(1)-(2).) To receive disability retirement benefits, the employee's incapacity must make retirement necessary and not arise from a preexisting condition. (*Id.* at subd. (b)(3)-(4).)

Here, Alcala contends no substantial evidence supports the court's determination that he is not permanently incapacitated.<sup>2</sup> Alcala cites the recorded opinions of several doctors who examined him in connection with his workers' compensation claim.

However, as the trial court noted, these opinions state Alcala "was *temporarily* disabled at various dates, [but] none of these records offer an opinion as to whether [Alcala] is *permanently* unable to perform his job duties."

Two doctors, Dr. Power and Dr. Curran, examined Alcala in connection with his disability retirement application. Both the adjudicator and the court gave Dr. Curran's

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<sup>2</sup> Alcala also contends "[t]he decisions and orders of the State of California Division of Industrial Accidents on the issue of vocational rehabilitation are admissible in a disability pension case as relevant evidence that the employee is disabled." We do not address this contention because neither the board's adjudicator nor the court ruled the WCAB evidence inadmissible, and, in fact, both the adjudicator and the court considered the opinions of the workers' compensation doctors.

opinion greater weight. The adjudicator stated "[w]hile it is true that a treating physician's opinion is entitled to considerable weight, in this case it is juxtaposed with the opinion of a very experienced board certified orthopedic surgeon, supported by objective tests . . . [that] fail to show any abnormality [that] would account for [Alcala's alleged incapacity]." The court stated "the evidence supporting Dr. Power's opinion pales in comparison to that supporting Dr. Curran's."

Alcala contends his alleged disability qualifies him for disability retirement benefits even if it arose from a preexisting condition. We need not address this contention; the court denied Alcala's petition because Alcala is not permanently incapacitated, not because his alleged disability was the result of a preexisting condition.

Dr. Curran's expert opinion that Alcala is not permanently incapacitated is substantial evidence supporting the court's denial of the writ.

## II

### *Collateral Effect of the WCAB Award*

The doctrine of collateral estoppel precludes a party from litigating an issue if (1) the identical issue was previously adjudicated, (2) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (3) the adjudication resulted in a final judgment. (*Bianchi v. City of San Diego, supra*, 214 Cal.App.3d at p. 566.)

Alcala relies on this court's decision in *Greator v. Board of Administration* (1979) 91 Cal.App.3d 54 to contend the WCAB award collaterally estops the SDCERS's decision because the identical issue of Alcala's back injury was previously adjudicated.

In *Greatorex*, the court held the WCAB's decision that petitioner's injury was work-related collaterally estopped the retirement board's decision it was not. (*Greatorex*, at pp. 57-58.) The work-relatedness of Greatorex's injury was the identical issue in the two actions. (*Ibid.*)

In contrast, the issue here is whether Alcala suffers a permanent incapacity at all. Alcala's WCAB award was based on a finding Alcala was *temporarily* disabled for the purpose of workers' compensation, and thus does not collaterally estop the determination of his *permanent* incapacity.

Even were the previously-adjudicated issue identical to the issue here, SDCERS was not a party to the prior proceeding and is not in privity with City. (*Bianchi v. City of San Diego, supra*, 214 Cal.App.3d at p. 571 [holding "the Retirement Board . . . is not in privity with the City"]; *see also Traub v. Board of Retirement* (1983) 34 Cal.3d 793, 799 [holding "[t]he distinctive identity, constituency and interests of a county retirement system" precludes a finding of privity with a county].)

### III

#### *SDCERS's Attorney's Cross-Examination of Alcala*

Alcala contends SDCERS's attorney "exceeded the bounds of zealous advocacy" during the administrative hearing by forcefully cross-examining Alcala. Alcala cites one legal authority, but does not explain how a case regarding discipline for deceptive practices of an attorney is relevant here. (See *Davis v. State Bar* (1983) 33 Cal.3d 231, 239.) Further, to permit our review, an appellate brief *must* "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the

matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C); see also *People v. Woods* (1968) 260 Cal.App.2d 728, 731.) Alcala does not provide citations to the record, without which we are unable to adequately evaluate the facts he believes support his position. Any factual portion of a brief not supported by necessary citations to the record may be stricken and the argument deemed waived. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; see also *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239.)

#### DISPOSITION

The denial of the writ of mandate is affirmed. SDCERS is entitled to costs on appeal.

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McDONALD, J.

WE CONCUR:

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McCONNELL, P. J.

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HALLER, J.